IN THE NEW MEXICO COURT OF APPEALS

SUNNYLAND FARMS, INC.,

Plaintiff-Appellee,

vs. No. 28,807

CENTRAL NEW MEXICO ELECTRIC CO-OP, INC.,

Defendant-Appellant.

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On Appeal From Thirteenth Judicial District, Cibola County,
The Honorable John W. Pope, District Judge

BRIEF OF THE NEW MEXICO TRIAL LAWYERS ASSOCIATION, *AMICUS CURIAE*, IN SUPPORT OF PLAINTIFF-APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES i

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT OF *AMICUS* NMTLA .....

I. THE COURT SHOULD NOT SIGNIFICANTLY CHANGE NEW MEXICO LAW BY ADOPTING § 351(3), WHICH ALLOWS A JUDGE TO LIMIT RECOVERY OF CONTRACT DAMAGES THAT THE JUDGE FINDS DISPROPORTIONATE TO THE CONSIDERATION 3

II. THE COURT SHOULD REJECT § 351(3) BECAUSE IT WOULD VIOLATE AN INJURED PARTY'S CONSTITUTIONAL RIGHT TO A JURY TRIAL 10

III. THE COURT SHOULD ONLY ADOPT § 351(3) IF IT ALSO MANDATES APPROPRIATE PROCEDURES FOR CHALLENGING A DAMAGE AWARD AS DISPROPORTIONATE 13

CONCLUSION 19

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

NEW MEXICO CASES:

Air Ruidoso, Ltd., Inc. v. Executive Aviation Center, Inc.,
1996-NMSC-042, 122 N.M. 71, 920 P.2d 1025 14

Akutagawa v. Laflin, Pick & Heer, P.A.,
2005-NMCA-132, 138 N.M. 774, 126 P.3d 1138 14

Allsup's Convenience Stores, Inc. v. North River,
1999-NMSC-006, 127 N.M. 1, 976 P.2d 1 ..... 11, 13

Page

Bellett v. Grynberg,
114 N.M. 690, 845 P.2d 784 (1992) 15

Bendorf v. Volkswagenwerk Aktiengeselischaft,
88 N.M. 355, 540 P.2d 835 (1975) 14

Camino Real Mobile Home Park Partnership v. Wolfe,
119 N.M. 436 (1995) 5

Chavez-Rey v. Miller,
99 N.M. 377, 658 P.2d 452 (Ct. App. 1982) 13

DeArmond v. Halliburton Energy Services, Inc.,
2003-NMCA-148, 134 N.M. 630 10

Jones v. Lee,
126 N.M. 467, 971 P.2d 858 (Ct. App. 1998) 5

Manouchehri v. Heim,
1997-NMCA-052, 123 N.M. 439, 941 P.2d 978 4

Mitchell v. Intermountain Cas. Co.,
69 N.M. 150, 364 P.2d 856 (1961) 4

Sandoval v. Chrysler Corp.,
1998-NMCA-085, 125 N.M. 292, 960 P.2d 834 12

Torrance County Mental Health Program, Inc. v. New Mexico Health and Environment Dept.,
113 N.M. 593, 830 P.2d 145 (1992) 3

Wall v. Pate,
104 N.M. 1, 715 P.2d 449 (1986) 5

FEDERAL CASES:

Aetna Ins. Co. v. Kennedy to Use of Bogash,
301 U.S. 389 (1937) 10

Blonder-Tongue Lab. v. University of Illinois Found.,
402 U.S. 313 (1971) 15

Page

Dimick v. Schiedt,
293 U.S. 474 (1935) 10, 12

Hetzel v. Prince William County,
523 U.S. 208 (1998) 12

Kennon v. Gilmer, 131, U.S. 22 (1889) 12

M.M. Silta, Inc. v. Cleveland-Cliffs, Inc.,
561 F. Supp. 2d 1052 (D. Minn. 2008) 9

Oden v. Oktibbeha County,
246 F.3d 458 (5th Cir. 2001) 15

Robotic Vision Systems, Inc. v. Cybo Systems, Inc.,
17 F. Supp. 2d 151 (E.D.N.Y. 1998) 8

Sovereign Chemical & Petroleum Products, Inc. v. Ameropan Oil Corp.,
148 F.R.D. 208 (1992) 8

Sundance Cruises Corp. v. The American Bureau of Shipping,
7 F.3d 1077 (2d Cir. 1993) 7, 8

OTHER STATE CASES:

All Points Towing, Inc. v. The City of Glendale,
735 P.2d 145 (Az. App. Ct. 1987) 9

Perini Corp. v. Greate Bay Hotel & Casino,
610 A.2d 364 (N.J. 1992) 9

ENGLISH CASE:

Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145 (1854), ... 3

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS:

U.S. Const., Amend VII 10, 13

N.M. Const., Article II, Section 12 .... 10, 13

Page

Rule 1-008(C) NMRA 14

UJI 13-2217 NMRA 16

RESTATEMENT (SECOND) OF CONTRACTS § 351(3) (1981) .... passim

MISCELLANEOUS AUTHORITY

Melvin Aron Eisenberg, *The Principle of Hadley v. Baxendale*, 80 Cal. L. Rev. 563, 611 (May 1992) 3, 4, 5, 6

Paul T. Wangerin, *Damages for Reliance Across the Spectrum of Law: Of Blind Men and Legal Elephants*, 72 Iowa L. Rev. 47, 97 (October 1986) 6

William Burnett Harvey, *Discretionary Justice Under the Restatement (Second) of Contracts*, 67 Cornell L. Rev. 666 (April 1982) 6

STATEMENT OF THE CASE

This is a case in which the district court concluded that Central New Mexico Electric Cooperative ("The Coop") breached its contract with Sunnyland Farms, Inc., and that the evidence showed that Sunnyland suffered great economic harm because of The Coop's breach. (R.P. 1144–45.) The district court recognized that, under New Mexico law, Sunnyland was entitled to recover all of its foreseeable damages, and the district court explicitly found that all of Sunnyland's damages were foreseeable. (R.P. 1140.) It is against this backdrop—and despite the fact that The Coop never asked the district court to reduce the damages based on RESTATEMENT (SECOND) OF CONTRACTS § 351(3) (1981), and never argued that the damages should be limited on the ground that they were disproportionate to the consideration received from Sunnyland pursuant to their contract—that The Coop's supporting *Amicus*, New Mexico Rural Electric Cooperative Association ("The Coop Association") urges this Court to apply § 351(3), disregard the fact-finding below, and reverse the judgment in favor of Sunnyland as disproportionately excessive.

SUMMARY OF THE ARGUMENT OF *AMICUS*

Adopting § 351(3), as The Coop Association advocates, would radically change New Mexico law with respect to contract damages and therefore should not be adopted. If this Court were to consider adopting § 351(3) (which it should not) then

careful procedures must be implemented so as not to fundamentally change the roles of trial judges and juries in determining the appropriate amount of such damages. As explained below, courts in New Mexico have long accepted that the findings of juries as to which damages are foreseeable mark the boundary between damages that are recoverable and those that are not. But making § 351(3) part of the law of our state could significantly shift that boundary. It could give a trial judge the discretion to prevent an injured party from recovering damages for losses that a jury has found foreseeable, based solely on the judge's determination that "justice so requires" because the damages are "disproportionate." This would be a monumental change.

The Court should reject § 351(3) for two reasons. First, § 351(3) prevents injured parties from receiving full compensation for their foreseeable losses. Second, § 351(3) deprives injured parties of their right to a jury trial because it permits judges to usurp the jury's authority to determine which damages are recoverable.

If the Court accepts § 351(3) in some form (which we recommend that it should not), this Court should clearly delineate procedures for raising and resolving claims of disproportionality. NMTLA recommends procedures that ensure that injured parties have an opportunity to present evidence and argument to the trial court, that trial judges and juries retain their traditional, constitutionally mandated roles in determining damages, and that appellate courts can serve their function as reviewing courts.

ARGUMENT OF *AMICUS* NMTLA

I. THE COURT SHOULD NOT SIGNIFICANTLY CHANGE NEW MEXICO LAW BY ADOPTING § 351(3), WHICH ALLOWS A JUDGE TO LIMIT RECOVERY OF CONTRACT DAMAGES THAT THE JUDGE FINDS DISPROPORTIONATE TO THE CONSIDERATION.

The rule of foreseeability summarized in RESTATEMENT (SECOND) OF CONTRACTS § 351(1) and § 351(2) has long been part of New Mexico law as to contract damages. However, the rule in § 351(3)— which allows a judge to deny the recovery of damages even if they were determined foreseeable by the fact-finder—has no basis in New Mexico law. Instead of restating our law, it prescribes radically new law on an important subject.

The first two subsections of § 351 restate the century-and-a-half-old rule of *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854), which allows a party to a contract that has suffered harm as a result of another party's breach to recover damages for foreseeable losses. Section 351(1) provides, "Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made." Section 351(2) explains when a loss is foreseeable.

New Mexico follows the approach set out in *Hadley* and restated in the first two subsections of § 351. *See Torrance County Mental Health Program, Inc. v. New Mexico Health and Environment Dept.*, 113 N.M. 593, 602 830 P.2d 145, 154 (1992)

(citing both *Hadley* and RESTATEMENT § 351 in adopting the view of courts that had "freely translated the rule of *Hadley* to mean that special damages may be recovered if the loss was foreseeable by the breaching party at the time of contracting"); *see also* *Mitchell v. Intermountain Cas. Co.*, 69 N.M. 150, 152, 364 P.2d 856, 857 (1961) ("Damages resulting from the breach of contract which could not reasonably have been within the contemplation of the parties are not recoverable.").

New Mexico, however, has not embraced § 351(3). Our published case law includes only a single reference to § 351(3), and the Court made that one reference only in passing. In *Manouchehri v. Heim*, 1997-NMCA-052, ¶ 25, 123 N.M. 439, 941 P.2d 978, the Court noted that "[p]erhaps some limit could be placed on recovery for particularly large lost profits," and cited § 351(3) using an appropriate *cf.* signal to indicate that the subsection only provided some support, by way of analogy, for imposing such a limit. Yet *Amicus* Coop Association contends that "[t]he *Manouchehri* court explained that where the lost profits are particularly large, some limits could be placed on the amount of recovery." (Brief of *Amicus Curiae* Coop Association at 9.) This overstates the significance of the Court's one-sentence aside, which simply acknowledged the *possibility* that some limits might lawfully be imposed. The Court never held that such limits may be imposed and never indicated that § 351(3) accurately stated New Mexico law. Surely the Court would have

analyzed the issue thoroughly before making a sea change in our contract law by adding a disproportionality limit to the longstanding foreseeability rule. Section 351(3) is simply not part of New Mexico law.

It is no surprise that New Mexico has never adopted § 351(3), and the Court should not adopt it now for several reasons. Section 351(3) partially undoes *Hadley* as well as §§ 351(1) and (2) by allowing a judge to preclude an award of damages for losses even where there is a factual finding that such damages were foreseeable. The problem with § 351(3) is apparent on its face. It provides:

> A court *may limit damages for foreseeable loss* by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

RESTATEMENT (SECOND) OF CONTRACTS § 351(3) (1981) (emphasis added). This is inconsistent with the longstanding, well-grounded rule that allows for the recovery of consequential damages that are foreseeable. *See Jones v. Lee*, 126 N.M. 467, 473, 971 P.2d 858, 864 (Ct. App. 1998) (special damages may be awarded by the fact finder in a breach of contract case if foreseeable); *Camino Real Mobile Home Park Partnership v. Wolfe*, 119 N.M. 436, 443, 446 (1995) (holding that breaching party is liable for general damages and special or consequential damages reasonably foreseeable as a result of breach); *Wall v. Pate*, 104 N.M. 1, 2, 715 P.2d 449, 450 (1986) (holding that special damages may be awarded if loss was foreseeable at time of contracting).

Section 351(3) simply cannot be squared with New Mexico law. Indeed, as one scholar recognized, § 351(3) "radically undermines" the principles of foreseeability that have long been adhered to in many states, including New Mexico. Melvin Aron Eisenberg, *The Principle of Hadley v. Baxendale*, 80 CAL. L. REV. 563, 611 (May 1992); *see also id.* ("Properly understood, the concept that damages may be limited in cases where justice so requires does not add to, but instead swallows up, the principle of *Hadley v. Baxendale*."). Another scholar has described § 351(3) as "an extraordinarily extensive expansion of the flexibility theory of damages"—the theory that allows courts to limit damages as justice requires. Paul T. Wangerin, *Damages for Reliance Across the Spectrum of Law: Of Blind Men and Legal Elephants*, 72 IOWA L. REV. 47, 97 (October 1986). [1]

The Court should not adopt § 351(3) in this case where no party or *amicus* has provided any legal basis or persuasive argument to flip well-settled New Mexico contract law on its head. *Amicus* Coop Association advocates for the application of § 351(3) in this appeal and requests that this Court strike the damages awarded because

[1] Section 351(3) was "an innovation lacking any antecedent in the first Restatement," but, surprisingly, that radical change in the RESTATEMENT did not rest on any radical changes in judicial thinking. William Burnett Harvey, *Discretionary Justice Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 666 (April 1982). Courts had not widely accepted the theory of flexible damages before the drafters of the RESTATEMENT added flexible damages provisions such as § 351(3). Wangerin, 72 IOWA L. REV. at 97.

they are disproportionate to the consideration received under the contract. In support of its argument, The Coop Association goes outside the record made by the parties in this case and cites cases regarding the determination of foreseeable damages and the "tacit agreement" principle of contract damages. But the issue of foreseeability and the principle that requires a tacit understanding between parties have nothing to do with § 351(3), despite The Coop Association's suggestion that they are one in the same. *See* Harvey, n.1 *supra* at 667–668 (explaining that § 351(3) can be described as an additional limitation on consequential damages, which assumes that the foreseeability requirement has been met). The trial court determined that the consequential damages were foreseeable in this case. (R.P. 1140.) Not content with that result, The Coop Association now requests that this Court adopt the rule of § 351(3), which would allow the Court to ignore the award of consequential damages here, even though the damages were foreseeable. No appellate court in New Mexico has ever accepted this proposition.

The cases on which The Coop Association relies do not support its argument that this Court should adopt § 351(3) and strike an award of damages already found to have been foreseeable. For instance, in *Sundance Cruises Corp. v. The American Bureau of Shipping*, 7 F.3d 1077 (2d Cir. 1993), the Second Circuit affirmed the district's court dismissal of a claim for consequential damages made by a plaintiff

shipowner against a company that had provided the ship (which ultimately sank) with a classification certificate. The circuit court agreed with the district court that the damages plaintiffs sought were not foreseeable and therefore special damages were not recoverable. The holding in *Sundance*, however, provides no support for the Coop Association's argument in this case. *Sundance* did not involve a situation where, as here, there *was* a finding of foreseeability, but a defendant sought to avoid having to pay the full damages found because the award was allegedly disproportionate to the consideration paid on contract. In the other case relied upon by The Coop Association, *Robotic Vision Systems, Inc. v. Cybo Systems, Inc.*, 17 F. Supp. 2d 151 (E.D.N.Y. 1998), the court did not adopt or apply § 351(3), but instead only mentioned its existence in its discussion as to whether the consequential damages sought in the case were foreseeable. *See id.* at 160 ("A different conclusion could well implicate Section 351(3) of the Restatement Second of Contracts[.]").

Recognizing the inherent problems with § 351(3) and its conflict with the general rule regarding foreseeability and the award of consequential damages, many jurisdictions that have addressed the section have been reluctant to adopt it. *See, e.g., Sovereign Chemical & Petroleum Products, Inc. v. Ameropan Oil Corp.*, 148 F.R.D. 208, 213 (1992) (declining to expand Illinois law to include § 351(3) and stating that "[t]he limitation on damages set forth in Comment f [to Section 351(3)] has been

applied rarely and only to limited and particular circumstances"); *Perini Corp. v. Greate Bay Hotel & Casino*, 610 A.2d 364 (N.J. 1992) (rejecting defendant's plea to apply § 351(3), recognizing that "[f]ew cases have mentioned § 351(3) in dicta; fewer still have actually relied on that section in limiting damages."); *All Points Towing, Inc. v. The City of Glendale*, 735 P.2d 145, 148 (Az. App. Ct. 1987) (refusing defendant's request that § 351(3) be applied to limit an award of consequential damages, stating that "[w]e will not substitute our judgment for that of the trier of fact as to the amount of damages. . . "); *M.M. Silta, Inc. v. Cleveland-Cliffs, Inc.*, 561 F. Supp. 2d 1052, 1058 (D. Minn. 2008) (deciding not to apply § 351(3) because no Minnesota state or federal decision had ever adopted or applied it and because the court was hesitant to preclude the damage award based on a theory of disproportionality where "the contract at issue was entered into between two experienced commercial entities."). New Mexico should follow suit and decline to adopt § 351(3) as being inconsistent with the general rule of contract damages.

In sum, the Court should be hesitant to change the legal landscape in New Mexico law by adopting a rule of contract damages that runs contrary to our well-settled jurisprudence. Section 351(3) is an obscure and rarely used section of the RESTATEMENT that would undermine the longstanding rule of foreseeability, and The Coop Association fails to provide a sound legal argument in support of its adoption.

II. THE COURT SHOULD REJECT § 351(3) BECAUSE IT WOULD VIOLATE AN INJURED PARTY'S CONSTITUTIONAL RIGHT TO A JURY TRIAL.

NMTLA is concerned not only that § 351(3) permits limiting the damages available to make injured parties whole, but that it would allow a trial judge's determination that damages are disproportionate to trump a jury's finding that the damages are foreseeable and therefore recoverable. Any such judicial usurpation of the authority of the jury would run afoul of the Seventh Amendment of the Constitution of the United States and Article II, Section 12 of the New Mexico Constitution.

"[T]he right of jury trial is fundamental[.]" *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393 (1937); *see also DeArmond v. Halliburton Energy Services, Inc.*, 2003-NMCA-148, ¶ 18, 134 N.M. 630 (recognizing "a fundamental right to a jury trial"). In the words of the Supreme Court of the United States:

> The right of trial by jury is of ancient origin, characterized by Blackstone as "the glory of the English law" and "the most transcendent privilege which any subject can enjoy[.]" . . . Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 485–486 (1935).

One of the jury's factfinding duties is to award damages. "It is a fundamental

function of a jury to determine damages." *Allsup's Convenience Stores, Inc. v. North River,* 1999-NMSC-006, ¶ 16, 127 N.M. 1, 976 P.2d 1 (internal quotation marks and quoted authority omitted). In contract cases, we entrust juries with the critical task of determining whether damages are foreseeable. When a contract case presents an issue as to whether damages are foreseeable, trial courts must instruct juries that "[a]ny damages found by you must be damages which, at the time of making the contract, the parties reasonably could have expected to be a consequence of any breach." UJI 13-843 NMRA.

If adopted, § 351(3) would violate the right of an injured party to a jury trial with respect to damages because it would allow a trial court judge to reduce damages a jury has already found foreseeable and therefore recoverable. Once the jury has awarded damages based on its determination that those damages are foreseeable, a judge cannot "limit damages for foreseeable loss by excluding recovery for lost profits, by allowing recovery only for loss incurred in reliance, or otherwise" simply based on a judicial finding "that in the circumstances justice so requires in order to avoid disproportionate damages." RESTATEMENT § 351(3). Any such limitation would allow the judge to become the final arbiter of damages in violation of the injured party's constitutional right to a jury trial.

The law governing remittitur confirms that it would be unconstitutional for the

judge to have the last word on the amount of recoverable damages. Long ago, the Supreme Court of the United States held that "no court of law, upon a motion for new trial for excessive damages and for insufficiency of evidence to support the verdict, is authorized, according to its own estimate of the amount of damages which the plaintiff out to have recovered, to enter absolute judgment for any other sum than that assessed by the jury." *Kennon v. Gilmer*, 131, U.S. 22, 29 (1889). The amount of damages must rest on a determination made by a jury, unless the injured party agrees to accept damages in the lesser amount that the judge has determined appropriate. If a trial court judge determines that a "verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages." *Dimick v. Schiedt*, 293 U.S. at 486; *see also Hetzel v. Prince William County*, 523 U.S. 208, 1211–12 (1998) (holding that writ requiring entry of judgment "for a lesser amount than that determined by the jury without allowing petitioner the option of a new trial" could not "be squared with the Seventh Amendment"). When a trial court concludes that the evidence does not support the jury's damage award, it has the discretion to order remittitur, but only as an alternative to a new trial. *See Sandoval v. Chrysler Corp.*, 1998-NMCA-085, ¶ 10, 125 N.M. 292, 960 P.2d 834. Without giving the

injured party the option of a new trial, "a remittitur would invade the province of the jury and violate the constitutional right to trial by jury." *Chavez-Rey v. Miller*, 99 N.M. 377, 379, 658 P.2d 452, 454 (Ct. App. 1982).

The cases establish that the Seventh Amendment and Article II, Section 12 prohibit a judge from entering judgment in amount less than that awarded by the jury, unless the injured party foregoes his right to have a jury determine the amount of damages. This constitutional prohibition applies with equal force to a judge's reduction of a jury's award of damages under § 351(3), which is based solely on a judicial finding that the damages are disproportionate. As in the case of a forced remittitur with no option for a new jury trial, a reduction of damages pursuant to § 351(3) would make "the verdict . . . that of the court and not the jury." *Allsup's Convenience Stores, Inc.*, 1999-NMSC-006, ¶ 14. Requiring an injured party to accept such a verdict would deprive the injured party of its constitutional right to have a jury determine damages.

III. THE COURT SHOULD ONLY ADOPT § 351(3) IF IT ALSO MANDATES APPROPRIATE PROCEDURES FOR CHALLENGING A DAMAGE AWARD AS DISPROPORTIONATE.

If the Court chooses to consider adopting § 351(3) (which it should not), this Court should establish procedures that ensure that the parties have a meaningful opportunity to present arguments and evidence pertaining to the § 351(3)

considerations to the trial court, and that respects the roles of juries, trial judges, and appellate courts. NMTLA respectfully suggests that the Court mandate the following procedures.

A party seeking to avoid liability under § 351(3) should be required to plead that the damages are disproportionate as "an avoidance or affirmative defense." *See* Rule 1-008(C) NMRA. This pleading requirement makes sense for two reasons. First, § 351(3) shares an essential quality with other affirmative defenses. Like other affirmative defenses, the defense of disproportionality of damages "avoids a liability already established." *Bendorf v. Volkswagenwerk Aktiengeselischaft*, 88 N.M. 355, 358, 540 P.2d 835, 838 (1975). If the injured party proves to the factfinder—whether jury or judge—that the breach of contract caused some amount of foreseeable damages, the breaching party can partially avoid liability by establishing that awarding the full measure of damages would result in "disproportionate compensation."[2]

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[2] Not all affirmative defenses completely negate liability; some reduce the amount of recoverable damages. For example, a defendant who successfully proves failure to mitigate damages—an affirmative defense under Rule 1-008(C) NMRA—generally avoids liability for only some of the injured party's damages. "It is a well established principle in New Mexico that an injured party has a responsibility to mitigate its damages, or run the risk that any award of damages will be offset by the amount attributable to its own conduct." *Air Ruidoso, Ltd., Inc. v. Executive Aviation Center, Inc.*, 1996-NMSC-042, ¶ 14, 122 N.M. 71, 920 P.2d 1025; *see also Akutagawa v. Laflin, Pick & Heer, P.A.*, 2005-NMCA-132, ¶ 18, 138 N.M. 774, 126 P.3d 1138 (holding that "failure to mitigate does not necessarily bar all recovery for damages and usually only serves to reduce the amount of recoverable damages").

Section 351(3).

Second, as with other affirmative defenses, early notice of the assertion of a § 351(3) defense is critical to avoid unfair surprise. *See Blonder-Tongue Lab. v. University of Illinois Found.*, 402 U.S. 313, 350 (1971) (holding that purpose of requiring a party to plead an affirmative defense at the outset of the litigation is to give the opposing party notice of the defendant's theory); *Oden v. Oktibbeha County*, 246 F.3d 458, 467 (5th Cir. 2001) (recognizing that affirmative defenses must be pled to avoid surprise and give opposing party opportunity to respond); *Bellett v. Grynberg*, 114 N.M. 690, 692–93, 845 P.2d 784, 786–87 (1992) (holding that district court abused its discretion by permitting party to rely on affirmative defense because opposing party did not have adequate notice and was prejudiced as a result). A party relying on a defense under § 351(3) must alert the trial court and the parties, as early in the litigation as possible, that one of the issues in the case is whether the damages the injured party seeks are disproportionate to the consideration the breaching party received.[3] This allows the parties to conduct discovery and to investigate all the issues pertinent to § 351(3), to consult with experts about those issues, and to prepare to

[3] To provide adequate notice to the injured party and prevent prejudice, the breaching party must assert its affirmative defense immediately after it learns the dollar amount or magnitude of the claimed damages. If that first becomes clear in discovery, the breaching party should file an amended answer or, at the very latest, in the pretrial order.

present pertinent evidence at trial. At trial, the party asserting the disproportionality of damages defense must adduce evidence in an attempt to carry its burden of proof, and the plaintiff must have the opportunity to present evidence to prove that the damages it seeks are, in fact, proportional and just. The trial court should supplement the applicable uniform jury instructions with a special interrogatory that reads as follows: "If you have found that defendant breached the contract and that any of plaintiff's damages are foreseeable, has defendant proven that plaintiff's foreseeable damages are disproportionate to the amount the contract required plaintiff to pay defendant?" *See* UJI 13-2217 NMRA (uniform jury instruction for special interrogatories). The jury must make the finding as to disproportionality and the findings with respect to the amount of recoverable damages within each category to afford both parties their constitutional rights to a jury trial. If the jury finds that the damages are not disproportionate, then the judge has no power to reduce the damages based on § 351(3). However, if the jury answers this question in the affirmative, then the judge obtains the authority to limit the damages in the manners specified in § 351(3). The judge then considers the evidence presented at trial, in light of the arguments of both parties, when determining whether "in the circumstances justice . . . requires" a limitation of the damages that the jury. Section 351(3). If the judge decides to exercise his or her discretion to limit the damages, the judge would explain the reasons

for the decision on the record and enter an order limiting the damages.[4] The order would state which of the three methods of limiting the damages the judge has used: (1) "excluding recovery for lost profits," (2) "allowing recovery only for loss incurred in reliance," or (3) "otherwise."[5] It would also state the amount of the reduction.

NMTLA's recommended procedures would afford both parties an opportunity to conduct discovery and present evidence, would guarantee the constitutionally required jury trial, and would allow for the fully-developed record needed for meaningful appellate review. Without such procedures, none of the participants in the litigation—

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[4] NMTLA has considered the possibility that remittitur might be used to implement § 351(3) in a manner that preserves the constitutional right to a jury trial. If a party moved for a new trial based on § 351(3), and if the judge determined that justice required a limitation of damages to avoid disproportionate compensation, the judge could give the injured party two options: (1) remit part of the damages or (2) hold a new trial on damages. However, unlike the current remittitur procedure, in which the judge reviews determinations the jury has already made, a remittitur system that includes § 351(3) would allow the judge to be the sole arbiter of whether a damage award is disproportionate. A jury would never have the opportunity—either in the original trial or a new trial—to make a factual finding with respect to the proportionality of the damage award because it would never receive an instruction based on § 351(3). For the reasons in the text, it cannot be constitutional to keep this critical damages determination from the jury and assign it exclusively to the judge.

[5] In some cases it might be useful, or even necessary, to propound special interrogatories as to the dollar value of each type of damages the plaintiff seeks. Having an itemized list of the damages would permit the judge to limit the damages in accordance with the jury's verdict by, for example, subtracting the amount of lost profit from the verdict, rather than requiring the judge to estimate what part of the verdict should be ascribed to lost profits.

neither the parties, the trial court judge, the jury, nor the appellate court—can fulfill their duties.

This litigation illustrates just how a breaching party's failure to raise § 351(3) in a timely fashion and present pertinent evidence and argument in the trial court works unfairness on the injured party, both in the trial court and on appeal. The Coop had many opportunities to alert the trial court to its belief that awarding all of the damages Sunnyland sought would result in "disproportionate compensation," and that justice required the court to limit the damages on that basis. But The Coop never raised the issue. This prevented Sunnyland from marshaling and adducing evidence to prove that the damages were not disproportionate and that justice did not require the trial court to limit its damages.

Even after the trial court entered a finding that all of Sunnyland's damages were foreseeable (R.P. 1140), The Coop failed to argue that the damages were disproportionate under § 351(3). The Coop had ample opportunity to do so. Over a year passed between the entry of the findings of fact and the entry of the original judgment (R.P. 1120, 1303), and the parties filed 134 pages of briefs and participated in a long hearing during that time. Because The Coop never invoked § 351(3) in the trial court, the judge never considered or ruled on whether Sunnyland's damages were disproportionate, and the § 351(3) issue has arisen for the first time as an afterthought

on appeal, having only been raised directly by its supporting *Amicus,* Coop Association.[6]

If the Court decides to adopt § 351(3) notwithstanding the fundamental flaws described above, the Court should adopt procedural requirements to ensure that injured parties are not forced to respond to a disproportionality defense for the first time on appeal. Such procedures must also ensure that appellate courts are not left to decide—in the first instance and without the benefit of a full record—whether damages are so disproportionate as to render an award unjust. Because the procedures outlined above were not followed in this case, then the foreseeable damages, as determined by the fact-finder below, should not be overturned and any ruling with respect to § 351(3) should be prospective only.

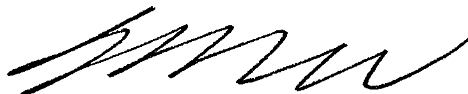
CONCLUSION

The Court should reject § 351(3) because it can be used to prevent injured parties from being fully compensated for their foreseeable losses and because it threatens to deprive injured parties of their constitutional right to have a jury determine

[6] As Sunnyland has explained, because The Coop failed to raise the § 351(3) issue in the trial court and on appeal and because the issues on appeal are limited to those raised by the parties, the Court need not decide whether to adopt § 351(3) and if so, what procedures to mandate. *See* Sunnyland's Answer Brief. These questions would be best answered in a case in which a party has raised and preserved the question, and in which the record contains sufficient evidence and factual findings to permit meaningful appellate review.

what amount of damages will fully compensate them. Any adoption of § 351(3) must be accompanied by procedures that would guarantee that injured parties are afforded an opportunity to present evidence and arguments in the district court with respect to the justness of awarding the full measure of foreseeable damages.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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